No. 80-169

In The

Supreme Court of the United States

October Term, 1980

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

WILLIAM MITCHELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the petitioner in this case.

INTEREST OF THE AFL-CIO

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 104 national and international labor organizations representing approximately 13,500,000 employees throughout the United States. This case concerns the applicable limitations period for challenging determinations under grievance arbitration systems established through collective bargaining. Decision

of the question presented will affect the functioning of that system which is central to the administration of the majority of collective agreements. It is for that reason that the AFL-CIO seeks this opportunity to present its views to the Court.

ISSUE TO BE COVERED IN THE BRIEF AMICUS CURIAE

The Court of Appeals considered itself to be bound by *Auto Workers* v. *Hoosier Corp.*, 383 U.S. 696, to determine the applicable limitations period in this case "as a matter of federal law, by reference to the appropriate state statute of limitations" (*id.* at 704-705, quoted at A. 135). We submit that the court below was not so bound by *Hoosier*, and that the lower court erred in applying a state statute of limitations, rather than the limitations period specified in the National Labor Relations Act, which is directly involved in this case. The attached brief *amicus curiae* is devoted to demonstrating that proposition.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals considered itself to be bound by *Auto Workers* v. *Hoosier Corp.*, 383 U.S. 696, to determine the applicable limitations period in this case "as a matter of federal law, by reference to the appropriate state statute of limitations" (*id.* at 704-705, quoted at A. 135). We submit that the court below was not so bound by *Hoosier*, and that the lower court erred in applying a state statute of limitations, rather than the limitations period specified in the

National Labor Relations Act (NRLA), which is directly involved in this case.[1]

A.

Hoosier involved a straightforward breach-of-contract damage suit brought by a union against an employer under § 301 of the Labor Management Relations Act (LMRA). In the context of that action, which "closely resemble[d] an action for breach of contract," and which did not implicate "those consensual processes that federal labor law is chiefly designed to promote—the formation of the agreement and the *private settlement of disputes under it*" (*Hoosier*, 383 U.S. at 702; emphasis added), the Court, in the absence of

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[1] For the reasons stated by the district court herein (A. 128-130) and urged in the petitions for certiorari in the instant case, and in *United Steelworkers of America* v. *Flowers*, No. 80-26 (presently pending), we submit that the more closely analogous state statute would be the New York arbitration law, CPLR § 7511(a), which provides a three-month limitations period. The policy of finality of arbitration awards which is furthered by that provision applies to plaintiff's claims against the employer and the union. Presumably, this issue of proper characterization will be argued fully in petitioner United Parcel's brief and we therefore do not address it.

We do urge however that if the Court decides the case on that ground, and thereby pretermits the broader issues which are discussed in this brief *amicus curiae*, that the Court do so without foreclosing consideration of these issues in some future case in which they may be decisive. Mr. Justice Jackson once observed with his usual felicity of expression that "sometimes the path that we are beating out by our travel is more important to the future wayfarer than the place in which we choose to lodge." *First Nat. Bank* v. *United Airlines*, 342 U.S. 396, 398 (concurring opinion). To borrow his metaphor, we urge that nothing be said in this case which will block for future travelers the "path that we are beating out" by the analysis in this brief.

an express limitations provision applicable to § 301 suits, applied a state statute of limitations.

The instant case, on the other hand, is a hybrid "§ 301 and breach of duty suit[]" (*Vaca* v. *Sipes*, 386 U.S. 171, 197 n.18) brought by an employee against an employer and a union to set aside a "final and binding" determination of a grievance arrived at through the collectively bargained method of settling such disputes. The plaintiff's two claims have entirely different statutory sources and jurisdictional bases—the duty of fair representation being implied from the NLRA. At the same time, in a suit such as that here the plaintiff's claims are inextricably interdependent.

B.

The collective agreement in *Hoosier* contemplated court enforcement. The agreement in this case, on the other hand, embodies the policy of § 203(d) of the LMRA—that "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes * * *." And, as this Court stated in *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 578, "Arbitration of labor disputes under collective bargaining is part and parcel of the collective bargaining process itself." Where the contract provides for final and binding settlement of grievances, that provision is respected by the courts: the contract remedies are exclusive with the single exception that a "union's breach [of its representation duty] * * * removes the bar of the finality provision of the contract." *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 567. These rules all have their genesis in the NLRA. In particular, the duty of fair representation—which is the

predicate of the plaintiff's action in this case—is derived from the NLRA, not from § 301.

C.

Thus, at the threshold, the nature of this lawsuit is shaped by NLRA principles designed to serve the goals of a functioning collective bargaining system and bears no resemblance to a common law contract damage action designed to determine responsibility for, and to allocate the losses attendant on, a breach. That being so, two considerations mandate the use of the NLRA limitations period set fourth in § 10(b).

First, Congress crafted § 10(b) precisely to protect ongoing collective bargaining systems from delayed attack. As this Court put it in *Machinists Local* v. *Labor Board*, 362 U.S. 411, 425, underlying the six-month bar of § 10(b) is a Congressional purpose to foster "stability of bargaining relationships." Moreover, the Act favors "final" settlement of contract disputes as the preferred means to the end of stabilizing bargaining relationships and securing industrial peace. If such settlement could be challenged long after the fact, these purposes of a system of private "final adjustment" of grievances would be undermined.

Second, the point just made becomes conclusive when it is remembered that the employee's duty of fair representation claim is implied from the NLRA, and court jurisdiction over that claim is provided by 28 U.S.C. § 1337 not by § 301. More precisely, some or all breaches of that duty constitute unfair labor practices under §§ 8(b)(1)(A) & (b)(2) of the NLRA. To the extent breach of the representation duty is an unfair labor practice, the limitations pe-

riod of § 10(b) is directly applicable. And whether the representation duty is stated as an unfair labor practice or whether it is related to §§8(b)(1) & (b)(2) in its general purpose and effect, § 10(b) is the proper source for determining when claims of breach of duty must be raised. For that limitations period reflects Congress' judgment as to when claims of like or identical character must be brought.

D.

That Congress has failed to provide an express limitations period for a judicially enforceable cause of action this Court has found implied in the NLRA should not be equated with a Congressional failure to state a limitations period for an action expressly created by statute. It cannot reasonably be assumed in this regard, as it was in *Hoosier*, that Congress' silence reflects an intent to apply state statutes of limitations to NLRA-based actions.

One aspect of the instant case is predicated on §301 of the LMRA: if the plaintiff can establish his NLRA breach of the duty of fair representation claim, he may then pursue his § 301 breach of contract claim. But here, unlike *Hoosier*, the latter is a direct challenge to the result reached in the contractual grievance resolutions system. The policy of promoting stability in collective bargaining which underlies the six-month limitations period in the NLRA is directly implicated by this aspect of plaintiff's case as well.

And the contractual aspect of this proceeding cannot, in any event, be disentangled from the breach of duty aspect for purposes of determining the limitations period, because breach of the union's duty is a necessary predicate to pursuit of the contract claim. When the six-month period has

passed with respect to the alleged union breach of its duty, that conduct becomes beyond challenge, and the precondition for maintaining the contract action cannot be met.

Finally, under the applicable rule most recently stated in *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 367, even were it appropriate to view the suit here as simply founded on § 301, the proper course would be to apply § 10(b), which expresses the relevant national policies, rather than a state statute of limitations.

ARGUMENT

1. *Auto Workers* v. *Hoosier Corp.*, 383 U.S. 696, was a straightforward breach-of-contract damage suit brought by a union against an employer under § 301 of the Labor Management Relations Act (LMRA). "Congress did not provide a uniform limitations provision for § 301 suits" (*id.* at 703), and the Court concluded that in the case before it a state statute of limitations should apply.

The *Hoosier* Court recognized that

> The need for uniformity [in § 301 cases] * * * is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it. [*Id.* at 702.]

In the Court's view that consideration did not justify judicial creation of a uniform limitations period applicable to § 301 suits generally:

> For the most part, statutes of limitations come into play only when [the] processes [mandated by federal labor law] have already broken down. Lack of uni-

> formity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy. [*Id.*]

The Court, however, added this caution:

> The present suit is essentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreement. Such an action closely resembles an action for breach of contract cognizable at common law. Whether other § 301 suits different from the present one might call for the application of other rules on timeliness, we are not required to decide, and we indicate no view whatsoever on that question. [*Id.* at 705 n. 7.]

The instant case is a hybrid "§ 301 and breach of duty suit[]" (*Vaca* v. *Sipes*, 386 U.S. 171, 197 n. 18), brought by an employee against an employer and a union to set aside a "final and binding" determination of a grievance arrived at through the collectively bargained method of settling such disputes. As this Court has recognized, the plaintiff's two claims have entirely different statutory sources and jurisdictional bases—the duty of fair representation being derived not from § 301 but from the National Labor Relations Act (NLRA). Yet, in a suit such as that here the plaintiff's claims are inextricably interdependent:

> To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. [*Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 570-571.]

We show now that in contrast to a *Hoosier* claim, such suits do not resemble classic common law actions but are

the unique product of an interplay between § 301 of the LMRA—which as the *Hoosier* Court noted has no limitations provision—*and* the NLRA as amended. The latter, of course, does contain a limitations provision, § 10(b), for initiating unfair labor practice claims which Congress fashioned to safeguard the stability of functioning collective agreements. For the reasons we develop § 10(b) should be held to provide the limitations period governing suits like the present.

2. The collective agreement in *Hoosier* contemplated court enforcement. The agreement in this case, on the other hand, embodies the policy of § 203(d) of the LMRA—that "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes * * *." See *Truck Drivers Union* v. *Riss & Co.*, 372 U.S. 517. Compare *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 426 (where the Court deemed it "important to note" the same distinction in a different context).

In *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 578, the Court distinguishes commercial arbitration, which reflects a breakdown of the contractual relationship, from "arbitration of labor disputes under collective bargaining [which] is part and parcel of the collective bargaining process itself":

> Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. * * * The processing machinery is

> actually a vehicle by which meaning and content are given to the collective bargaining agreement. * * * The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement. [*Id.* at 581]

In conformity both with the policy stated in § 203(d) and with the intent of the parties, where the contract provides for final and binding settlement of grievances, that provision is respected by the courts:

> A * * * rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. * * * [I]t would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95, 103. [*Republic Steel* v. *Maddox*, 379 U.S. 650, 653.]

The "general federal rule" (*id.* at 652) of exclusivity of contract remedies announced in *Maddox* admits of only one exception:

> The union's breach of [its representation] duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract. [*Hines*, 424 U.S. at 567.]

And the *Hines* Court noted that while § 301 "contemplates

suits by * * * individual employees, * * * and contrary to earlier indications § 301 suits encompass those seeking to vindicate 'uniquely personal' rights of employees such as * * * wrongful discharge" (*id.* at 562), if the contract provides for arbitration the exception just stated must be satisfied to bring the employee's right to sue into play.

3. The rules of the *Warrior & Gulf, Maddox* and *Hines* cases all have their genesis in the NLRA.

Section 203(d) of the LMRA states in express terms the basic point of the collective bargaining system established by §§ 7, 8(5) & 9(a) of the original Wagner Act, as explained by Chief Justice Hughes in *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 237:

> The [Wagner] Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. * * * Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. Representing such a large percentage of the employees of the companies, and precluding strikes and providing for the arbitration of disputes, these agreements are highly protective to interstate and foreign commerce.

And in 1947, Congress in adding § 8(d) to the statute elaborated the duty to bargain as an obligation that continues beyond the process of negotiating a contract to the process of resolving questions arising under the agreement. As the Court stated in *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 436:

> [T]he duty to bargain unquestionably extends beyond

> the period of contract negotiations and applies to labor-management relations during the term of an agreement. *NLRB* v. *C & C Plywood Corp., ante,* p. 421; *Labor Board* v. *F. W. Woolworth Co.,* 352 U.S. 938. • • • Section 8(a)(5) proscribes failure to bargain collectively in only the most general terms, but § 8(d) amplifies it by defining "to bargain collectively" as including "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to . . . any question arising [under an agreement]. . . .

The *Maddox* rule in turn implicates another basic NLRA principle—that of "majority" rule which is codified in § 9(a). Insofar as employee rights are based on a collective agreement, those rights are, as has been understood from the beginning, subordinated to those of the majority. As this Court reaffirmed in *Emporium Capwell Co.* v. *Community Org.,* 420 U.S. 50, 62:

> Central to the policy of fostering collective bargaining where the employees elect that course, is the principle of majority rule. See *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937). • • • In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority. • • • As a result, "[t]he complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338 (1953).

In a footnote to this passage the Court observed:

> In introducing the bill that became the NLRA, Senator Wagner said of the provisions establishing majority rule: "Without them the phrase 'collective bargain-

> ing' is devoid of meaning, and the very few unfair employers are encouraged to divide their workers against themselves.'' 79 Cong. Rec. 2372 (1935). [420 U.S. at 62, n. 13.]

One consequence is that the collective agreement extinguishes whatever rights the employee may have had under an individual contract with his employer. This result is logically inherent in the very concept of collective bargaining. The subject was most fully addressed in *J. I. Case Co.* v. *Labor Board,* 321 U.S. 332, 337-339:

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. * * * Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility. * * * The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result.

Finally, this Court has found the limitation on the majority rule principle that plaintiff invokes in this case—the duty of fair representation—to be ''implicit in the National Labor Relations Act.'' *Electrical Workers* v. *Foust,* 442 U.S. 42, 46-47 n. 8. That duty is, of course, not stated expressly in the NLRA. Nor is the representation duty expressed in the Railway Labor Act (RLA), from which

statute the duty was first implied by the Court in *Steele* v. *L. & N. R. Co.*, 323 U.S. 192. Citing (*id.* at 199-200), that Act's provisions according employees "the right to organize and bargain collectively through representatives of their own choosing" (§ 2, Fourth), vesting in the "majority of any craft or class of employees * * * the right to determine who shall be the representatives of the craft or class for the purposes of this Act" (*id.*), and "requiring carriers to bargain with the representative so chosen" (323 U.S. at 200, characterizing § 2, Second), the Court reasoned:

> The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. [323 U.S. at 202.]

Because the RLA contained no administrative means to redress violations of this duty, the Court implied a judicial cause of action for its enforcement:

> In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent an act for the members of a craft, is of judicial cognizance * * *. [T]here is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected. [*Id.* at 207.]

In a companion case, the Court held that the federal district courts have jurisdiction to entertain such federal causes of action under Judicial Code § 24(8)—now 28 U.S.C. § 1337—as cases "arising under a law regulating commerce." *Tunstall* v. *Brotherhood*, 323 U.S. 210, 213.

The provisions of the RLA from which the Court in

Steele drew the representation duty find their analogy in § 7 (providing employees "the right to self organization * * * [and] to bargain collectively through representatives of their own choosing"), § 9(a) (specifying that "[r]epresentatives designated or selected * * * by the majority of the employees in a unit * * * shall be exclusive representatives of all the employees for the purposes of collective bargaining"), and § 8(5) (requiring employers to bargain with the representatives so chosen) of the original Wagner Act.

In contrast to the RLA, however, the NLRA has from the first contained an express prohibition on *employer* discrimination based on union membership or non-membership (§ 8(3)) and an administrative procedure to implement that prohibition (§ 10). Thus, in *Wallace Corp.* v. *Labor Board,* 323 U.S. 248, which was decided the same day as *Steele* and *Tunstall,* and which like the RLA cases, concerned a collective agreement benefiting union members and harming nonmembers, the Court concluded:

> The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as a bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. * * * We do not construe the provision authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the act to protect for all workers. It was as much a deprivation of the rights of

> these minority employees for the company discriminatorily to discharge them in collaboration with Independent as it would have been had the company done it alone. [*Id.* at 255-256.]

On this basis the Court in *Wallace* affirmed the Board's decision and order concluding that the employer's enforcement of the discriminatory agreement violated § 8(3).

Then, the 1947 Congress, in enacting the Taft-Hartley amendments, made it unlawful for unions "to restrain or coerce employees in the exercise of the rights guaranteed in section 7" (§ 8(b)(1)(A)), or "to cause or attempt to cause an employer to discriminate against an employee" based upon union membership (or based upon an effort to encourage or discourage union membership) (§ 8(b)(2)). This Court has explained the point of the latter of these amendments to be:

> The policy of the Act is to insulate employees' jobs from their organizational rights. Thus [§]8(b)(2) [was] designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. • • • This section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed. [*Radio Officers* v. *Labor Board,* 347 U.S. 17, 40, 42-43.]

And, Senator Taft stated the sponsors' rationale for the restrictions placed on exclusive bargaining representatives:

> The committee • • • felt that if it permitted a union

> shop agreement which provided that every man must be a member of the union, then the union must be reasonable, must accept as members all who apply for membership, and must accept them on the same terms as it applies to other members, and must permit them to remain in the union if they are willing to pay their dues. • • •
>
> One of the cases before the committee that I remember was a case in which a man happened to see a foreman knocked down by a union shop steward. He was called as a witness in the case in court, and he testified that the steward was the aggressor and had knocked down the foreman. The shop steward was convicted. The union immediately proceeded to fire that man from the union, and that compelled the employer to fire him from his job. Because he responded to a subpoena and told the truth, that man was fired, and perhaps in that community he could no longer work at the trade in which he was particularly skilled and trained. That is only an example.
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> • • •
>
> Let us take the case of unions which prohibit the admission of Negroes to membership. If they prohibit the admission of Negroes to membership, they may continue to do so; but, representatives of the union cannot go to the employer and say "You have got to fire this man because he is not a member of our union." [Legislative History of the Labor Management Relation Act of 1947 (G.P.O., 1948) 1096.]

Sections 8(b)(1)(A) & (b)(2) cover the central area of the duty of fair representation delineated by the *Steele* Court—discrimination by the exclusive representative on the basis of union membership. But, given that this Court had not prior to 1947 stated whether the *Steele* duty of fair representation applied to NLRA unions, and that the Taft-

Hartley amendments and their legislative history do not advert to, much less settle, that point, the following questions remained open: Whether the NLRA goes beyond the core area just noted and interdicts all forms of invidious conduct by exclusive representatives; and, whether the administrative procedures for enforcing unfair labor practices are the exclusive means of redress against such conduct by bargaining representatives.

In a series of decisions beginning with *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, the Court concluded that the duty of fair representation applies equally to NLRA and RLA unions. The relevant law is restated in *Hines*, 424 U.S. at 563-564:

> Necessarily "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents. . . ." ** *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 1953). The union's broad authority in negotiating and administering effective agreements is "undoubted," *Humphrey* v. *Moore*, 375 U.S. 335, 342 (1964), but it is not without limits. Because "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit," *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, "the responsibility and duty of fair representation." *Humphrey* v. *Moore*, *supra*. at 342. The union as the statutory representative of the employees is "subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co.* v. *Huffman*, *supra*, at 338.

In this connection, the Court has not, however, decided whether §§ 8(b)(1)(A) & (b)(2) fully encompass that duty or apply only to a more limited area of union abuse of authority as exclusive bargaining representative. *Vaca* 386 U.S. at 186.[2]

The Court has further determined that the duty of fair representation under the NLRA may be judicially enforced. *Vaca,* 386 U.S. at 176-188; *Syres* v. *Oil Workers,* 350 U.S. 892 (by reference to *Tunstall,* holding that jurisdiction over

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[2] In *Miranda Fuel Co.,* 140 NLRB 181, the NLRB ruled that violations of the duty of fair representation not made unfair labor practices under § 8(b)(2) are unfair labor practices under § 8(b)(1(A). This Court in *Vaca* found it unnecessary to decide whether *Miranda Fuel* was correctly decided, but simply "assume[d] for present purposes" (386 U.S. at 186) that the NLRB was correct in so ruling.

The Courts of Appeals are divided on this question. The Second Circuit, in *Miranda Fuel* itself, denied enforcement of the NLRB's order. 326 F.2d 172. See particularly *id.* at 175-178 which discusses the conceptual difficulties in the Board's approach. See also *NLRB* v. *Local 294, International Bro. of Teamsters, Etc.,* 317 F.2d 746,748-751 (2d Cir.). But see *NLRB* v. *Local 485, Int. U. of Electrical Wkrs.,* 454 F.2d 17, 21 n. 6 (2d Cir.). The majority of the Courts of Appeals have, on the other hand, upheld the NLRB's view that breach of the duty of fair representation is an unfair labor practice. See *Truck Drivers* v. *NLRB,* 379 F.2d 137 (D.C. Cir.); *Newport News Shipbuilding Co.* v. *NLRB,* —— F.2d ——, 104 LRRM 2633, 2637-38 (4th Cir.); *Abilene Sheet Metal, Inc.* v. *NLRB,* 619 F.2d 332, 347 (5th Cir.); *Kesner* v. *NLRB,* 532 F.2d 1169, 1173-74 (7th Cir.); *NLRB* v. *American Postal Workers Union,* FVR F.2d 1249, 1254-55 (8th Cir.); *Kling* v. *NLRB,* 503 F.2d 1044 (9th Cir.); *cf. Denver Stereotypers* v. *NLRB,* 623 F.2d 134, 136 (10th Cir.).

Here, as in *Vaca,* it is not necessary to resolve this dispute; we therefore do not address the correctness of these competing views.

an NLRA duty of fair representation claim exists under 28 U.S. § 1337).[3]

4. The foregoing makes it manifest that the instant case is not, as was *Hoosier,* one in which the "consensual processes that federal labor law is chiefly designed to promote —the formation of the collective bargaining agreement and the private settlement of disputes under it" have "broken down." 383 U.S. at 702.

The resolution of grievances through agreed upon contract procedures, as we have discussed, is at the heart of those "consensual processes." Moreover, an individual covered by a contractual grievance resolution system is not entitled to substitute a § 301 suit for that system unless he can demonstrate a breach by the union, not of some duty undertaken as a matter of contract, but of the representation duty implied from the NLRA and enforceable in whole or in part through that Act's administrative procedures.

Thus, at the threshold, the nature of this lawsuit is shaped by NLRA principles designed to serve the goals of a functioning collective bargaining system and bears no

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[3] In *Syres,* the complaint alleged jurisdiction under 28 U.S.C. § 1331, but both the district court and the court of appeals found jurisdiction lacking thereunder. 223 F.2d 739. The petition for writ of certiorari in *Syres* (No. 390, October Term, 1955) stated that "the primary question to be decided is a procedural matter as to the jurisdiction of the Federal District Courts under 28 U.S.C. 1331" (p. 8). The Court's summary reversal citing, *inter alia Tunstall,* establishes that jurisdiction was found either on that section or on its companion provision, 28 U.S.C. § 1337, which is identical for present purposes except in waiving the jurisdictional amount, and which was relied on in *Tunstall.*

resemblance to a common law contract damage action designed to determine responsibility for, and to allocate the losses attendant on, a breach. That being so, two considerations mandate the use of the NLRA limitations period set forth in § 10(b).

First, Congress crafted § 10(b) as it did precisely to protect ongoing collective bargaining systems from delayed attack. As this Court put it in *Machinists Local* v. *Labor Board,* 362 U.S. 411, 425, underlying the six-month bar of § 10(b) is a Congressional purpose to foster "stability of bargaining relationships." That provision states Congress' adjustment of the individual employee interests safeguarded by the Act and the "interest in 'industrial peace which it is the overall purpose of the Act to secure' " (362 U.S. at 428, quoting *Labor Board* v. *Childs Co.,* 195 F.2d 617, 621-622 (2d Cir.)) (con. op. of L. Hand, J.)). In *Machinists,* of course, the charge by the employees ran against the formation of the agreement. In a case such as the one here the complaint is against the agreement's administration. But § 8(d) defines the collective bargaining required by the Act to include both the process of making an agreement and the "grievance procedure [which] is a part of the continuing collective bargaining process." See *supra* at 10-11.

The Act, as we have developed, favors "final" settlement of contract disputes as the preferred means to the end of stabilizing bargaining relationships and securing industrial peace. If such settlement could be challenged long after the fact, these purposes of a system of private "final adjustment" of grievances would be undermined. As the Court emphasized in rejecting the contention that the judiciary

is to review the merits of every arbitral construction of a contract:

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.
>
> • • •
>
> [P]lenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. [*Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 596, 599.]

By the same token, if disappointed grievants are free to delay their challenges to final arbitral settlements, contrary to Congress' intent and the needs of the collective bargaining system, those settlements "will almost never be final." To be sure, the choice of where precisely the line should be drawn to accommodate these interests—the "repose" which Congress sought for the products of the collective bargaining process in order to serve "stability of bargaining relations" (*Machinists*, 362 U.S. at 425), as against "the vindication of [employees'] statutory rights" (*id.* at 429)—cannot be established as a matter of abstract reasoning. But in this instance Congress, "as the expositor of the national interest" (*id.* at 429), after weighing these competing factors, as decreed a six-month limitations period.

Second, the point just made becomes conclusive when it is remembered that the employee's duty of fair representation claim is implied from the NLRA not from § 301, and

court jurisdiction over that claim is provided by 28 U.S.C. § 1337 not by § 301. More precisely, some or all breaches of that duty constitute unfair labor practices under §§ 8(b)(1)(A) & (b)(2) of the NLRA. See *supra* at 13-19. At the least, there is no dispute that the representation duty and § 8(b)(2) coalesce when the impermissible conduct rests on consideration of union membership. To the extent breach of the representation duty is an unfair labor practice, the limitations period of § 10(b) is directly applicable.

Moreover, even if the duty extends to some acts that are not unfair labor practices, it remains true that the employee protections afforded both by *Steele* and its progeny and by §§ 8(b)(1)(A) & 8(b)(2) have a common genesis—the judgment that a system that grants exclusive authority to a statutory bargaining representative must safeguard the interests of affected individuals against abuse of that authority. The interest in being free from invidious union conduct is at the least then closely related to the interests protected in §§ 8(b)(1)(A) & (b)(2).

Thus, whether the representation duty is stated as an unfair labor practice or whether it is related to §§ 8(b)(1)(A) & (b)(2) in its general purpose and effect, § 10(b) is the proper source for determining when claims of breach of that duty must be raised. For that limitations period reflects Congress' judgment as to when claims of like or identical character must be brought. And, the anomaly of providing different periods for the same claim depending on the forum chosen or depending on the specific type of fair representation violation alleged would be entirely unjustified.[4]

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[4] There is no justification for attributing to Congress a reluctance to require suit filing, as distinguished from charge filing, within

5. *Hoosier* dealt with the question of the appropriate limitations period where Congress creates a federal claim enforceable in court but does not specify a federal limitations period. The question here is at several removes. The plaintiff's claim is based on an implied cause of action derived from legislation—the NLRA—that does contain an express limitations provision, albeit one addressed in terms solely to the administrative procedures Congress expressly provided for resolution of unfair labor practice charges. That Congress has failed to provide an express limitations period for a judicially enforceable cause of action that this Court found implied in the NLRA should not be equated with a Congressional failure to state a limitations period for an action expressly created by statute. It cannot reasonably be assumed in this regard, as it was in *Hoosier*, that Congress' silence reflects an intent to apply state statutes of limitations to these NLRA-based actions.

It remains true, of course, that one aspect of the instant case is predicated on § 301 of the LMRA: if the plaintiff can establish his NLRA breach of the duty of fair representation claim, he may then pursue his § 301 breach of contract claim. But here, unlike *Hoosier*, the latter is a direct challenge to the result reached in the contractual grievance resolution system. *Hoosier* itself recognized that:

> The need for uniformity, * * * is greatest where its absence would threaten the smooth functioning of those

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six months. Indeed, Congress has imposed upon employees a 90 day time limit for filing lawsuits in federal court under Title VII of the Civil Rights Act of 1964 (§ 706(f)(1), 42 U.S.C. § 2000e-5 (f)(1)), and a three-month time limit for individuals to sue to vacate arbitration awards under the United States Arbitration Act of 1925 (9 U.S.C. § 12). See, e.g., *Witt* v. *Reinholdt & Gardner*, 587 F.2d 383 (8th Cir.).

> consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and *the private settlement of disputes under it.* [383 U.S. at 702; emphasis added.]

The policy of promoting stability in collective bargaining which underlies the six-month limitations period in the NLRA is thus directly implicated by this aspect of plaintiff's case as well.

And, the contractual aspect of this proceeding cannot, in any event, be disentangled from the breach of duty aspect for purposes of determining the limitations period, because, as we have previously discussed, breach of the union's duty is a necessary predicate to pursuit of the contract claim. When the six-month period has passed with respect to the alleged union breach of its duty, that conduct becomes beyond challenge, and the precondition for maintaining the contract action cannot be met. As the Court held in *Machinists,* "a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10(b) [time limit]." 362 U.S. at 422.[5]

Finally, even were it appropriate to view the suit here as simply founded on § 301, the Court would not be obliged to apply a state statute of limitations. *Hoosier,* as we have seen, contemplated that "other § 301 suits different from the present one might call for the application of other rules on timeliness." *Supra* at 6-7. And, more generally, the Court has established that state limitations periods are not

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[5] Cf. *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553, 558: "United was entitled to treat that past act as lawful after [the employee] failed to file a charge of discrimination within the 90 days then allowed by § 706(d) [of Title VII]."

to be applied when to do so would "frustrate or interfere with the implementation of national policies":

> When Congress has created a cause of action and has not specified the period of time within which it may be asserted, the Court has frequently inferred that Congress intended that a local time limitation should apply. * * *
>
> But the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. * * * State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute. [*Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 367. See also *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 104; *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462.]

In this instance Congress has devised a limitations period precisely attuned to the implementation of the national policies that inform § 301 and breach of duty suits. Thus, the court, to further those policies, should follow Congress' lead rather than that of the state legislatures.

That conclusion is buttressed by *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, where this Court addressed a different, but analogous, question. Congress, in the Death on the High Seas Act (DOHSA), had expressly created a cause of action for wrongful death on the high seas. This Court, in the exercise of its traditional admiralty jurisdiction, had also recognized "a federal remedy for wrongful

death * * * under general maritime law." *Id.* at 621. In *Mobil,* the Court discussed the extent to which it was free, in adjudicating claims for wrongful death on the high seas under the general maritime law, to ignore the choices Congress had expressly made in DOHSA:

> We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to suppliment maritime statutes. The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages * * * The Act does not address every issue of wrongful-death law, * * * but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.
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> . . . There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations * * * Perhaps the wisdom we possess today would enable us to do a better job . . . than Congress . . ., but even if that be true, we have no authority to substitute our views for those expressed by Congress in a duly enacted statute. [*Id.* at 625-626. See also *Public Arm'r of Cty* v. *Angela Compania,* 592 F.2d 58 (2nd Cir.).]

Although technically speaking the judicially cognizable cause of action for breach of the duty of fair representation is an implied cause of action to enforce a right implied from an Act of Congress (rather than, as in *Mobil,* a cause of action provided through an exercise of the judicial lawmaking power conferred by the Constitution), in substance

the situations presented in that case and this are quite similar. This Court is therefore not "free," in fashioning the rules governing this implied cause of action, to ignore "Congress' considered judgment on such issues as • • • the limitations period." *Mobil, supra.*

CONCLUSION

For the above stated reasons the decision below should be reversed with instructions to dismiss the complaint as untimely.

Respectfully submitted,

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